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82-944

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WALTER CROFT BAGNELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Government induce an out-of-state distributor to ship sexually explicit films to a federal district with which he has had no prior contacts and then indict and convict him for violating the obscenity laws because the films exceed the community standards of the county to which the materials are shipped?

2(a) In a federal obscenity prosecution, may the relevant community be smaller than the federal district wherein the defendant is prosecuted?

2(b) In a case wherein the defendant is indicted for and accused of shipping obscene films to the Southern District of Florida, which includes a conservative county, Dade County, and a liberal county, Broward County, may the District Court exclude prospective jurors from Broward County, draw the jurors solely from Dade County, and direct

them to apply the community standards of only Dade County, and not the entire Southern District of Florida or even Broward County?

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IN THE

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OF THE UNITED STATES

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WALTER CROFT BAGNELL,

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UNITED STATES OF AMERICA,

Respondent.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982). It is attached hereto as Appendix A.

JURISDICTION

This is a criminal case wherein the United States District Court for the Southern District of Florida had jurisdiction pursuant to 18 U.S.C. Section 3231.

Petitioner was convicted on April 24, 1981 and the United States Court of Appeals for the Eleventh Circuit affirmed the conviction on June 28, 1982. United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982). Appellate Jurisdiction was based on 28 U.S.C. Section 1291.

Petitioner timely filed a Suggestion for Rehearing En Banc and a Petition for Rehearing, both of which were denied on September 21, 1982. A copy of the order of denial is attached hereto as Appendix B.

This Court has jurisdiction to review the judgment of the Court of Appeals by virtue of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2, Paragraph 3 of the Constitution provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be held at such place or places as the Congress may by law have directed.

2. The First Amendment to the Constitution provides, in part, as follows:

> Congress shall make no law ... abridging the freedom of speech ....

3. The Fifth Amendment to the Constitution provides, in part, as follows:

> No person shall be ... deprived of life, liberty, or property, without due process of law ....

4. The Sixth Amendment to the Constitution provides, in part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ....

5. Title 18, United States Code, Section 1462, provides, in part, as follows:

> Whoever ... knowingly uses any ... common carrier, for carriage in interstate ... commerce - (a) any obscene ... motion picture film ... shall be

fined not more than $5,000 or imprisoned not more than five years, or both ....

6. Title 18, United States Code, Section 1465, provides, in part, as follows:

> Whoever knowingly transports in interstate ... commerce for the purpose of sale or distribution any obscene ... film ... shall be fined not more than $5,000 or imprisoned not more than five years, or both....

7. Title 18, United States Code, Section 3237, provides, in part, as follows:

> ...
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from,

through, or into which such commerce or mail matter moves.

...

STATEMENT OF THE CASE

In early 1977 the Federal Bureau of Investigation began a nationwide investigation into violations of federal obscenity laws. As part of the investigation, FBI Agent Patrick J. Livingston formed a corporation, Gold Coast Specialties, in Miami, Florida from which he purported to operate a mail order pornography business (Reporter's Transcript, pp. 172-175, hereinafter "RT").

On September 7, 1977, Livingston met petitioner in Los Angeles, California, where petitioner lived and worked. Petitioner was in the "adult" motion picture business and had business dealings in certain parts of the country (RT 176-187), but had never been to the

Southern District of Florida and had never shipped anything to the Southern District of Florida (Record on Appeal, pp. 206-215, hereinafter "ROA").

Petitioner and Livingston met a few more times, during which Livingston ordered sexually explicit films from him. Petitioner twice shipped such films from Los Angeles to Livingston in Miami (RT 177-218). The Central District of California, which includes Los Angeles, is a more liberal and tolerant community with respect to sexually explicit films than is the Southern District of Florida, which includes Miami (ROA 207-208).

Petitioner was subsequently indicted by a federal grand jury in the Southern District of Florida for shipping obscene films to such district. The District Court had jurisdiction pursuant to 18 U.S.C. Section 3231. His pretrial motions to dismiss and/or for a change of venue and his renewed post trial motion to

dismiss, all based upon improper forum shopping by the Government, were denied by the district court (RT 115-134; 549-553; ROA 206-215). Petitioner based his motions upon Blucher v. United States, 439 U.S. 1061, 99 S. Ct. 823, 59 L.Ed.2d 27 (1979).

Over petitioner's repeated objections, the district court selected prospective jurors from Dade County alone and not from the Southern District of Florida and subsequently instructed them to apply the community standard of Dade County alone, not the entire Southern District of Florida, which included Broward County, a more liberal and tolerant community than Dade County. Petitioner's request that at least Broward County's community standards be considered along with Dade County's was denied (RT 1-92; 134-135; 370-371; 434-444; 517-520).

Petitioner was convicted of shipping obscene films to the Southern District of Florida and sentenced to 18 months imprisonment and

a $5,000.00 fine. In addition, he was placed on probation for 5 years on condition he not distribute sexually explicit material to Florida (United States v. Bagnell, 679 F.2d 826, 829 (11th Cir. 1982).

On appeal petitioner renewed his argument that his case should have been dismissed or transferred to the Central District of California because the Government, in violation of Blucher v. United States, 439 U.S. 1061, 99 S.Ct. 823, 59 L.Ed.2d 27 (1979), deliberately chose to have him ship films to the Southern District of Florida, a district with which he had no prior contact, "because it believed that a jury applying the community standards of that district would probably find that the materials were obscene. ... "United States v. Bagnell, 679 F.2d 826, 830 (11th Cir. 1982).

The Court of Appeals accepted petitioner's characterization of the Government's conduct,

for the sake of argument, and concluded that the Government may properly engage in such conduct. The Court of Appeals below specifically agreed with the Tenth Circuit's opinion in United States v. Blucher, 581 F.2d 244 (10th Cir. 1978), notwithstanding the fact that this Court vacated the conviction in Blucher and ordered the indictment dismissed! See Blucher v. United States, 439 U.S. 1061, 99 S.Ct. 823, 59 L.Ed.2d 27 (1979).

With respect to petitioner's challenge to the utilization of the Dade County community standard instead of the Southern District community standard, and to the refusal of the district court to at least include one additional Southern District County - Broward County - the Court of Appeals below rejected his challenge and again based its decision on an appellate case which this Court vacated. The Court of Appeals below relied upon United States v. Groner, 479 F.2d 577 (5th Cir. 1973).

This Court vacated the decision in Groner v. United States, 414 U.S. 969, 38 L.Ed.2d 213, 94 S.Ct. 278 (1973).

Petitioner's requests for rehearing and rehearing en banc having failed, he now seeks review in this Honorable Supreme Court.

REASONS FOR GRANTING THE WRIT

1. WHETHER THE GOVERNMENT MAY INDUCE AN OUT-OF-STATE DISTRIBUTOR TO SHIP SEXUALLY EXPLICIT FILMS TO A FEDERAL DISTRICT WITH WHICH HE HAS HAD NO PRIOR CONTACTS AND THEN INDICT AND CONVICT HIM BECAUSE THE FILMS EXCEED THE COMMUNITY STANDARDS OF THE COUNTY TO WHICH THE MATERIALS ARE SHIPPED IS AN ISSUE WHICH THIS COURT SHOULD DECIDE

The decision below conflicts with this Court's ruling in Blucher v. United States, 439 U.S. 1061, 99 S.Ct. 823, 59 L.Ed.2d 27 (1979). This Court should grant certiorari to end the confusion generated by Blucher. Some courts have expressed doubt as to the significance of this Court's summary reversal of the obscenity conviction in Blucher. For example, the majority in the two-to-one decision in United States v. Peraino, 645 F.2d 548, 553 (6th Cir. 1981) stated:

> Though the reasons for its summary reversal are not clear, the Supreme Court's action in Blucher v. United States, supra, does raise a question....

What exactly did this Court do in Blucher? We must examine the facts and history of the case to try to determine the answer.

The facts in Blucher are set forth in the opinion of the Court of Appeals, United States v. Blucher, 581 F.2d 244 (10th Cir. 1978). Mr. Blucher, a mail order distributor of sexually explicit materials in the District of Oregon, thrice sent obscene materials to the District of Wyoming in response to requests by postal authorities. He also mailed on 17 occasions advertisements to the District of Wyoming. He had had no prior contact with the District of Wyoming. He was subsequently indicted in the District of Wyoming and convicted of mailing obscene matter. His conviction was affirmed by the United States Court of Appeals for the Tenth Circuit. Mr. Blucher then filed a petition for writ of certiorari in which he raised the following questions:

> "1. May the Government deliberately obtain the mailing of material believed to be obscene into a federal district of its choice for the purpose

of obtaining jurisdiction for criminal prosecution, where no other contact exists between the defendant and the subject jurisdiction? May the Government fabricate jurisdiction?

2. May a District Court constitutionally exercise jurisdiction in a criminal prosecution under the Comstock Act where the sole contact between the defendant and the community is the mailing of allegedly nonmailable material into the district at the request of the Government, made for the purpose of obtaining criminal jurisdiction in a community where it would otherwise not exist?"

Petition for Writ of Certiorari, pp. 2-3, Blucher v. United States, No. 78-571.

The Government filed a memorandum in this Court in which it asked the Court to

"vacate the judgment of the court of appeals and remand the case to the district court with directions to vacate its judgment and dismiss the indictment...." Memorandum of United States, p.6, Blucher v. United States, No. 78-571. This Court was not obligated to accept the Government's confession of error. In Young v. United States, 315 U.S. 257, 258-59, 86 L.Ed.2d 832, 834-35 (1942), the Court stated in response to the Government's confession of error,

> "The Government confessed error and we brought the case here. . . The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judi-

cial function. The considered judgment of the law enforcement officers is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. . . ."

In accordance with its acknowledged obligation to examine the issues independently, the Court did so in the Blucher case. After independent examination, the Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the District Court with directions to vacate the judgment of conviction and to dismiss the indictment. See Blucher v. United States, 439 U.S. 1061, 59 L.Ed.2d 27, 99 S.Ct. 823 (1979).

The action taken by the Court in Blucher was a decision on the merits which required the District Court and the Court of Appeals to follow it. Summary actions of the Court are precedents. See Hicks v. Miranda, 422 U.S.

332, 343-345 (1975). It is true that summary actions are entitled to less precedential value than full opinions. See Edelman v. Jordan, 415 U.S. 651, 670-77 (1974). However, the Court in Edelman v. Jordan said that it "is less constrained by the principle of stare decisis than [it is] in other areas of the law." Id. at 671. The Court did not say that lower courts, including courts of appeals, are free to disregard summary actions of the Supreme Court. Thus, it may very well be that if this Court grants certiorari it may feel less constrained by Blucher than by a full opinion. However, this does not mean that the lower courts were free to disregard it. Yet, that is precisely what the Court of Appeals has done here. It has expressed agreement with the Tenth Circuit notwithstanding the fact that its decision was vacated. Under these circumstances, petitioner believes that review by this Court is absolutely necessary. This is especially so in light

of the fact that Blucher has created confusion.

The Court of Appeals below made no attempt to distinguish the facts of this case from those in Blucher. It could not have done so since for all practical purposes they are the same, as the following table indicates:

BLUCHER CASE	BAGNELL CASE
1. Defendant resided in the District of Oregon which was more "tolerant" than the District of Wyoming.	Petitioner resided in the Central District of California, which was more "tolerant" than the Southern District of Florida.
2. Defendant shipped materials from a more tolerant district to a less tolerant district.	Petitioner shipped materials from a more tolerant district to a less tolerant district.
3. Defendant's only contacts with the Dis-	Petitioner's only contacts with the Southern

trict of Wyoming were those initiated and pursued by Government authorities - postal officials.	District of Florida were those initiated and pursued by Government authorities - the FBI.
4. Postal authorities used false names.	The FBI used false names.
5. Defendant willingly responded to postal authorities requests for materials.	Petitioner willingly (conceded for the purpose of this comparison only) respondend to FBI requests for materials.
6. Defendant was a distributor of sexually explicit materials in the District of Oregon.	Petitioner was a distributor of sexually explicit material in the Central District of California.

7. Defendant pleaded guilty and preserved for appeal the propriety of being tried in the District of Wyoming.	Petitioner made unsuccessful pretrial motions to change venue and to dismiss and a post trial motion to dismiss challenging the right of the Government to try him in the Southern District of Florida.

The decision below is extremely broad. Acknowledging that petitioner had never shipped to the Southern District of Florida and, indeed, had had no contacts with the district, and acknowledging that the Government first solicited the shipments by contacting petitioner in Los Angeles, where he lived and worked, United States v. Bagnell, 679 F.2d at 834, the Court of Appeals has held that the Government may engage in such conduct notwithstanding the

fact that the only case specifically dealing with the issue was vacated by this Court.

The Court of Appeal's conclusion that this Court's ruling in Blucher was not on the merits is based on Thompson v. United States, 444 U.S. 248, 249-50 (1980), but that case does not support such a conclusion. The fact that this Court has "consistently" vacated judgments in cases wherein the Government has requested it to do so does not mean that this Court is obligated to do so. See Young v. United States, 315 U.S. 257, 258 (1942), which makes it clear that the Supreme Court is not compelled to accept the views of the Department of Justice.

Petitioner submits that it is fundamentally unfair and thus violative of due process for the Government to manufacture jurisdiction by inducing an out of state distributor with no prior contact with the district to ship sexually explicit films to such district. This contention, of course, is unique to materials, such as motion

picture films, which are presumptively protected by the First Amendment. See Jenkins v. Georgia, 418 U.S. 153 (1974). It would not apply to non First Amendment conduct such as the distribution of drugs. Given this Court's holding that community standards may vary from district to district, Hamling v. United States, 418 U.S. 87 (1974), the Government should not be permitted to induce one to ship "adult" films to a district with which he has had no prior contacts. When a "customer" orders films he implicitly asserts that the community to which the films are to be shipped tolerates such films. Of necessity the distributor must rely on this implicit representation because he cannot possibly know the community standards of every district in the country. If the Government wishes to prosecute someone in a particular district it should have some evidence that the person has previously shipped to such district. Otherwise, the Government

should limit prosecution to the district wherein the suspect does business. See United States v. Langford, 688 F.2d 1088 (7th Cir. 1982).

At a minimum, a person who has been induced to ship such materials should at least be able to urge the defense of entrapment. The Court of Appeals rejected this argument.

Finally, it is no answer to say that the Government also induced others to ship "adult" materials to Miami. If it is wrong as to one person it is wrong as to all.

2. WHETHER THE RELEVANT COMMUNITY IN A FEDERAL OBSCENITY CASE INVOLVING AN OUT OF STATE DISTRIBUTOR CAN BE SMALLER THAN THE FEDERAL DISTRICT TO WHICH THE DEFENDANT SHIPPED ALLEGEDLY OBSCENE FILMS AND WHEREIN HE IS TRIED IS AN ISSUE WHICH THIS COURT SHOULD DECIDE

In the instant case petitioner was indicted for sending obscene materials to "the Southern District of Florida." Districtwide community

standards had traditionally been used in obscenity cases. See, e.g., United States v. Marks, 520 F.2d 913 (6th Cir. 1975), reversed on other grounds, Marks v. United States, 430 U.S.188 (1979); United States v. Cohen, 583 F.2d 1030 (8th Cir. 1978); United States v. Danley, 523 F.2d 369 (9th Cir. 1975), cert. denied, 424 U.S. 929 (1976). Presumably when petitioner made the decision to ship the materials he could rely on the fact that Broward County, a very liberal and tolerant county, was a part of the Southern District of Florida. Whether the most liberal part of a federal district can be excised so as to increase the chances of conviction is a matter which should be resolved by this Court.

Petitioner submits that it was improper for the District Court to reject the community which was alleged in the Indictment and select a more conservative, smaller community. Since petitioner was accused of shipping obscene

films to the Southern District of Florida he should have been tried for that offense. Petitioner repeatedly requested that the community be defined as the Southern District of Florida or, at a minimum, that it at least include Broward County, which is immediately north of Dade County and which includes the more liberal community of Fort Lauderdale, where Deep Throat played.

Although there have been no decisions by this court directly on point, Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974) and Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260, 97 S.Ct. 990 (1977) support petitioner's contention herein that in federal obscentiy cases the community consists of the federal district. In upholding an obscenity conviction, this Court in Hamling stated,

"... Since this case was tried in the Southern District of California

and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw...." Id. at 613-14.

In United States v. Marks, 520 F.2d 913 (6th Cir. 1975), the Court of Appeals approved a jury instruction that "the contemporary community standards would be comprised of the Eastern District of Kentucky...." Id. at 918. This Court reversed Marks on a different point - that the due process/ex post facto protection of the Constitution was violated because the jury was instructed as to the new obscenity test even though the "crime" was committed prior to the adoption of the new obscenity test. See Marks v. United States, supra.

Petitioner submits that the District Court herein likewise violated due process/ex post facto principles by utilizing a geographic com-

munity which was not previously defined for the purpose of a federal obscenity case. Moreover, Hamling and sound policy would prevent the utilization of small geographic areas within federal districts for federal obscenity prosecutions. The burden would be too great. A person shipping sexually explicit materials to, for example, the Southern District of Florida relies on the fact that the liberal community of Fort Lauderdale, in Broward County, is a part of the relevant community. It is not fair to indict a defendant for shipping obscene materials to the Southern District of Florida, and then reject that district for the trial.

The Court of Appeals relied upon United States v. Groner, 479 F.2d 577 (5th Cir. 1973). It rejected a national standard in favor of a local standard, and is not authoritative since it dealt with the question of whether local or national standards should be used. The Court was not asked to decide whether the appropri-

ate community could be something smaller than a federal district. Moreover, this Court vacated the Fifth Circuit's Groner decision in Groner v. United States, 414 U.S. 969, 38 L.Ed.2d 213, 94 S.Ct. 278 (1973). On remand, the Fifth Circuit again affirmed the conviction. See United States v. Groner, 494 F.2d 499 (5th Cir. 1974), cert. denied 419 U.S. 1010, 42 L.Ed.2d 285, 95 S.Ct. 331 (1974). The decisions do not deal with the issue of applying a county-wide vs. district-wide standard.

The Northern District of Iowa was determined to be the appropriate community in United States v. Cohen, 583 F.2d 1030 (8th Cir. 1978) even though the jurors came from the Western Division of the Northern District. Cf. United States v. Dachstainer, 518 F.2d 20 (9th Cir. 1975), cert. denied, 421 U.S. 954, 44 L.Ed.2d 107, 95 S.Ct. 1688 (1975): In rejecting the defendant's argument that a national community standard instruction should not have been

given, the Ninth Circuit did impliedly concede that the appropriate community was the Northern District of California. In United States v. Danley, 523 F.2d 369 (9th Cir. 1975), cert. denied 424 U.S. 929, 47 L.Ed.2d 338, 96 S.Ct. 1143 (1976), the Court approved the use of statewide community standards and wider standards in a federal prosecution where the district consisted of the entire state.

In rejecting petitioner's request and in ruling that the community would be only Dade County, the District Court may have relied on Florida law although none was cited by the Government or the Court. Florida state law does seem to authorize the use of one county in state obscenity cases. See Davison v. State, 288 So.2d 483 (1973) and Johnson v. State, 351 So.2d 10 (1977) where the Florida Supreme Court held that in state obscenity cases a local county standard and not a Florida statewide standard applies. While the Florida Supreme

Court may have some company,[1] most states have rejected the utilization of local standards in favor of a statewide standard. The courts of California,[2] Colorado,[3] New York,[4] Texas,[5] Washington,[6] and Wisconsin[7] have

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1/ The Georgia Supreme Court utilized a local, not statewide, standard in Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183 (1973), rev'd on other grounds, Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 94 S.Ct. 2750 (1974). The Alabama Court of Criminal Appeals also used a local standard in Brazelton v. State, 50 Ala. App. 723, 282 So.2d 342 (1973).

2/ In re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535 (1968).

3/ People v. Tabron, 544 P.2d 380 (1976).

4/ People v. Heller, 33 N.Y.2d 314, 352 N.Y.S. 2d 601, 307 N.E.2d 805 (1973).

5/ La Rue v. State, 611 S.W.2d 63 (1980).

6/ State v. J-R Distributors, Inc., 82 Wash.2d 584, 512 P.2d 1049 (1973).

7/ Court v. State, 63 Wis.2d 570, 217 N.W.2d 676 (1974).

rejected local standards in favor of statewide standards.

State law, however, does not control federal obscenity prosecutions. In Smith v. United States, 431 U.S. 291, 52 L.Ed.2d 324, 97 S.Ct. 1756 (1977), the defendant was indicted for mailing obscene materials from Des Moines, Iowa, to Mount Ayr, Iowa, and Guthrie Center, Iowa, all of which were located in the Southern District of Iowa. See 28 U.S.C. section 95. Although the entire state of Iowa had repealed its obscenity statutes and although the entire transaction was intrastate, this Court affirmed the obscenity conviction.

The Court stated that the state legislature's determination not to prosecute obscenity cases was not binding upon federal courts in Iowa. The Court stated,

> "An even stronger reason for holding that a state law regulating distribution of obscene material cannot

define contemporary community standards in the case before us is the simple fact that this is a federal prosecution under section 1461...." (emphasis in original). Id. at 303.

No matter how valid Florida's method of handling state obscenity violations might be, its willingness to permit each county to determine its own community standards cannot be binding upon a federal court in Florida. It may very well be that a local distributor of sexually explicit material should know or could be expected to know the community standards of each county. It is far different for an out-of-state distributor to know each county's standards. The difficulties imposed by Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), which rejected a national standard in favor of state standards, would be impossible to overcome if a national distributor were required to know the standards of

each county of every state in the country.

There is no controlling decision by the Court and there are conflicting decisions by various circuit courts. Therefore, it would seem to be appropriate for this issue to be resolved by this Court. It is a significant issue because one elementary principle of due process - notice - requires that all elements of the crime, including in this case the relevant community, be defined in advance. This is recognized by the Sixth Amendment's requirement that the "[d]istrict shall have been <u>previously</u> ascertained by law...." (Emphasis added).

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this Honorable Court to grant certiorari and reverse the judgment below.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Petitioner

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WALTER "FRENCHY" BAGNELL,

Defendant-Appellant.

No. 81-5384

June 28, 1982.

Appeal from the United States District Court for the Southern District of Florida.

Before VANCE, HATCHETT and ANDERSON Circuit Judges.

VANCE, Circuit Judge:

Appellant, Walter Bagnell, challenges his conviction under the federal obscenity statutes. After trial by jury, Bagnell was convicted under two counts charging use of

a common carrier for the interstate transportation of obscence material, in violation of 18 U.S.C. Sec. 1462,[1] and two counts charging interstate transportation or obscene material for purposes of sale and distribution, in violation of 18 U.S.C. Sec. 1465.[2]

1/ 18 U.S.C. Sec. 1462 provides in pertinent part:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce--
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or
>
> Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful--
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

2/ 18 U.S.C. Sec. 1465 provides in pertinent part:

(Continued)

On appeal, Bagnell asserts numerous errors, none of which is meritorious. We therefore affirm.[3/]

In early 1977 the Federal Bureau of Investigation (FBI) began a nationwide investigation into violations of the federal obscenity laws, focusing upon shipments of

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2/ (Continued)

Whoever knowingly transports in interstate of foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonogragh recording electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

3/ Bagnell was fined $5,000 and sentenced to prison for eighteen months under the first count of the indictment. He was placed on probation for a total of five years on the remaining three counts, subject to the condition that he did not distribute sexually explicit material to Florida during his probationary period.

obscence materials to the Miami, Florida area. As part of the investigation, FBI Agent Patrick J. Livingston formed a corporation, Gold Coast Specialties, from which he purported to operate a mail order pornography business. Livingston traveled throughout the country to arrange for shipments of pornographic materials to the Miami based Gold Coast Specialties from various producers and distributors. On September 7, 1977 Livingston was introduced to Bagnell in Los Angeles, California by Paul Howard, an owner of several adult book stores and massage parlors in Tampa, Florida who had previously purchased pornography from Bagnell. During this meeting, Livingston and Bagnell discussed the pornography industry, their connections with it across the country, and the attendant difficulties with law enforcement efforts and debt collection. Specifically, Bagnell mentioned his efforts

to avoid detection for shipping pornography to Tulsa, Oklahoma and his problems with a customer in Baltimore, Maryland who owed him $34,000.

Bagnell and Livingston met again the next day. At that time Livingston proposed to purchase some of Bagnell's movies, and Bagnell readily agreed to the sale of fifty movies. The only thing about which there was any debate was the price, which they quickly set at $5.50 for each film. Livingston received the films in Miami four days later,[4/] and paid Bagnell by check when the two met at Paul Howard's home in Tampa on September 15, 1977.

Bagnell and Livingston met once more, on October 11 in Chicago, Illinois. Livingston's check for the fifty movies had bounced,

4/ The September 12, 1977 shipment contained ten copies each of five different movies from the "Sexual World" series. Only two of the movies were the subject of the criminal charges eventually brought against Bagnell.

so Livingston repaid Bagnell in cash. At the same time Livingston arranged to purchase more movies from Bagnell for $5.00 each. On December 14, 1977 Livingston received in Miami a shipment of four movies from Bagnell. Unlike the first shipment, which consisted of several heterosexual movies, this second shipment contained two copies each of two different films portraying homosexual acts.[5/]

Bagnell had no further contacts with Livingston, but he was not charged with any crime for over a year. On February 11, 1980, however, a federal grand jury for the southern district of Florida indicted Bagnell and forty-four other persons for conspiracy to violate the federal obscenity

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5/ The titles of these two movies were Jeff and Frank and Dale and Ed, both from the "Intimate Moments" series. Both movies were introduced into evidence and formed the basis for two of the four counts of his indictment.

statutes and numerous parallel substantive violations. This original indictment was eventully superseded and the grand jury issued sixteen separate indictments. One of these superseding indictments charged Bagnell individually with four offenses arising out of the two movie shipments to Miami. A jury subsequently convicted Bagnell and this appeal followed.

I. VENUE

Bagnell first contends that venue did not properly lie in the southern district of Florida because the government's decision to prosecute him in that district constituted improper forum shopping. Specifically, he contends that the government chose to have him ship materials to the southern district of Florida because it believed that a jury applying the community standards of that district would probably find that the materials were obscene. He asserts

that such forum shopping by the government violates his right to due process. Assuming arguendo that Bagnell's characterization of the government's conduct as forum shopping is accurate, his argument evinces a misunderstanding of the principles of venue and due process and therefore must fail.

The right of criminal defendants to be tried in the state and judicial district in which the alleged crime occurred is guaranteed by article III of and the sixth amendment to the United State Constitution as well as Rule 18 of the Federal Rules of Criminal Procedure. United States v. Davis, 666 F.2d 195, 198-99 (5th Cir. 1982). It is well established that the use of common carriers to ship obscene materials and the interstate shipment of such materials are continuing offenses that occur in every judicial district which the material touches. See Reed Enterprises v. Clark, 278 F.Supp.372, 380 (D.D.C.1967) (three judge

court), aff'd mem., 390 U.S. 457, 88 S.Ct. 1196, 20 L.Ed.2d 28 (1968). Consequently, there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent. Id. Cf. Hamling v. United States, 418 U.S. 87, 106, 94 S.Ct. 2887, 2901, 41 L.Ed. 2d 590 (1974) ("distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials"). The venue question, then, becomes one of legislative intent. Travis v. United States, 364 U.S. 631, 636-37, 81 S.Ct.358, 361-362, 5 L.Ed.2d 340 (1961). Specifically, did Congress intend to allow the prosecution of pornography distributors in the district to which they transmit their products? This question must be answered with a resounding yes.

Section 1462 proscribes the use of common carriers to distribute obscene material,

while section 1465 prohibits the transportation of such materials through interstate commerce. By their very terms, these statutes describe offenses within the venue provisions of 18 U.S.C. Sec. 3237(a), which declares that any offense "involving the use of the mails, or transportation in interstate commerce" is a continuing offense that may be prosecuted in any district in which the crime took place.[6/]

6/ 18 U.S.C. Sec. 3237(a) provides:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

See generally United States v. Bullock, 451 F.2d 884, 889 (5th Cir. 1971) (discussing proper venue for offense involving illegal interstate transportation of stolen postal money orders).

United States v. Peranio, 645 F.2d 548, 551 (6th Cir. 1981). Venue was therefore proper in the southern district of Florida because it is the district in which the materials were received. See United States v. Walker, 559 F.2d 365, 372 (5th Cir. 1977); United States v. Slepicoff, 524 F.2d 1244, 1249 (5th Cir. 1975), cert denied, 425 U.S. 998, 96 S.Ct. 2215, 48 L.Ed.2d 824 (1976); United States v. McManus, 535 F 2d 460, 463-64 (8th Cir. 1976), cert denied, 429 U.S. 1052, 97 S.Ct. 766, 50 L.Ed.2d 769 (1977).7/

7/ Any doubts that may have existed about Congress' intent to treat federal obscenity violations as continuing offenses were put to rest with the 1958 amendments to 18 U.S.C. Sec. 1461, 1462. Congress amended these statutes for the express purpose of overruling a tenth circuit decision holding that section 1461 was not a continuing offense, see United States v. Ross, 205 F.2d 619 (10th Cir. 1953), and thereby ensured that venue would lie "not only at the place at which the objectionable matter is mailed, but also at the place of address or delivery, or in any judicial district through which such mat-

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Bagnell argues that the Supreme Court's disposition of Blucher v. United States, 439 U.S. 1061, 99 S.Ct. 823, 59, L.Ed.2d 27 (1979), compels a contrary conclusion. He contends that Blucher stands for the proposition that the due process clause precludes forum shopping of any sort in obscenity cases, thus overriding general venue principles which would otherwise allow his trial to be held in the southern district of Florida. We disagree. In Blucher the defendant was convicted of obscenity charges after egregious forum shopping by the local prosecutors. The tenth circuit affirmed the conviction, stating that venue in pornography cases was "subject to the creative zeal of federal

7/ (Continued)

ter is carried." H.R. Rep.No. 1614, 85th Cong., 2d Sess. 2 (1958). See also Conf.Rep.No. 2624, 85th Cong., 2d Sess. 3-4 (1958); United States v. McManus, 535 F.2d 460, 463-64 (8th Cir. 1976) (discussing impact of 1958 amendments on venue in obscenity prosecutions), cert. denied, 429 U.S. 1052, 97 S.Ct. 766, 50 L.Ed.2d 769 (1977).

enforcement officer." United States v. Blucher, 581 F.2d 244, 245-46 (10th Cir. 1978). While a petition for certiorari on the forum shopping point was pending before the Supreme Court, the Solicitor General moved to dismiss the indictment as contrary to an internal Justice Department policy regarding venue in obscenity prosecutions. The Supreme Court subsequently vacated the conviction without comment and ordered the indictment dismissed. Blucher v. United States, 439 U.S. at 1061, 99 S.Ct. at 823.

It is clear that the Supreme Court's disposition of Blucher was not a decision on the merits of the venue claim, but was merely a response to the Solicitor General's motion. See Thompson v. United States, 444 U.S. 248, 249-50, 100 S.Ct. 512, 513-514, 62 L.Ed.2d 457 (1980) (per curiam) (citing Blucher as an example where the Court has "responded to requests by the Government ... by granting certiorari and vacating the judgments"). Con-

sequently, the summary action of the Supreme Court in Blucher has no precedential value for the specific venue issue presented in this case. Indeed, Bagnell's due process argument has been foreclosed by the decision in Hamling v. United States, 418 U.S. at 87, 94 S.Ct. at 2887. In Hamling the Supreme Court specifically held that it was constitutionally permissible to subject defendants in obscenity prosecutions to varying community standards of the various judicial districts into which they transmit obscene material. Id. at 106, 94 S.Ct. at 2901. We agree with the tenth circuit that at a minimum, prosecutors may elect to bring obscenity charges against a defendant in either the district of dispatch or the district of receipt without running afoul of the due process clause. See United States v Blucher, 581 F.2d at 245-46; accord, United States v. Peraino, 645 F.2d at 551. Indeed, prosecution in the district of receipt is eminently reasonable in veiw of the

fact that it is the recipient community that suffers the deleterious effects of pornography distribution. United States v. McManus, 535 F.2d at 464.[8/]

It is equally unavailing for Bagnell to assert that his prosecution violated an enforceable Justice Department policy regarding venue. The former fifth circuit has repeatedly held that Justice Department policies such as the one allegedly involved in this case are merely matters relating to the internal operations of the Justice Department and create no

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8/ We reserve judgment, however, on the case in which an obscenity prosecution is brought in a judicial district through which allegedly pornographic material passes en route to another destination. Although prosecution in this transit district would seem to be allowed by the liberal venue provision of section 3237, that case would be more problematic in light of both the legistative history of the 1958 amendments to the federal obscenity statutes and the principles underlying the due process clause. See United States v. McManus, 535 F.2d 460, 463-64 (8th Cir. 1976). cert. denied, 429 U.S. 1052, 97 S.Ct. 766, 50 L.Ed.2d 769 (1977); United States v. Luros, 243 F.Supp. 160, 176 (N.D. Iowa 1965), rev'd on other grounds, 389 F.2d 200 (8th Cir. 1968).

enforceable right on the part of a criminal defendant. See, eg., United States v. McInnis, 601 F.2d 1319, 1323 (5th Cir. 1979), cert. denied, 445 U.S. 962, 100 S.Ct. 1649, 64 L.Ed. 2d 237 (1980); United States v. Nelligan, 573 F.2d 251, 255 (5th Cir. 1978); Fry v. United States, 569 F.2d 303, 304 (5th Cir. 1978). See also United States v. Caceres, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979). It is thus solely within the province of the Justice Department to determine whether an internal policy against forum shopping in obscenity cases should bar prosecution in a given case.

Bagnell also contends that the district court abused its discretion in denying his motion for a change of venue to the central district of California pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure. We disagree. A criminal defendant has no right to be tried in the place of his domicile, United States v. Walker, 559 F.2d at 372, and the de-

fendant's concerns about the expense and inconvenience of being tried away from home are ordinarily of little relevance to a motion for a change of venue. United States v. Sanchez, 508 F.2d 388, 393-95 (5th Cir.) cert. denied, 423 U.S. 827, 96 S.Ct. 45, 46 L.Ed.2d 44 (1975). Additionally, we note that in light of the "contemporary community standards requirement of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) it is logical to try a defendant [in a federal obscenity case] in the district to which he allegedly mailed obscene materials." United States v. Slepicoff, 524 F.2d at 1249. Indeed, it is the district of receipt that suffers the brunt of the harms associated with the distribution of pornography and is most in need of protecting itself by the application of its community standards to the materials in question. See United States v. Luros, 243 F.Supp. 160, 176 (N.D. Iowa 1965), rev'd on other grounds, 389 F.2d

200 (8th Cir. 1968); H.R.Rep.No.1614, 85th Cong., 2d Sess. 6 (1958); 104 Cong.Rec. 8991-92 (May 19, 1958) (remarks of Reps. Keating and Reuss). Courts should thus exercise restraint in granting Rule 21(b) motions in obscenity prosecutions. See United States v. McManus, 535 F.2d at 464. At an irreducible minimun, obscenity defendants must demonstrate substantial unfair prejudice flowing from a denial of such a motion before we will overturn the district court's action. See United States v. Walker, 559 F.2d at 372. There was no such showing here, so we will not disturb the district court's ruling.

II. EXPERT TESTIMONY

At trial, the district court allowed Arthur R. Green, pastor of the Christ Metropolitan Community Chruch in Miami, to appear as an expert witness for the prosecution. Pastor Green is homosexual and his congregation is predominantly homosexual as well. He testified to

the Miami homosexual community's standards regarding pornography and he opined that the average person in that community would find that the two homosexual films in question in this case appealed to the prurient interest. Bagnell contends that while expert testimony regarding the homosexual community standards about pornography was required in this case, Pastor Green was not qualified to give such expert testimony. He argues further that he was prejudiced because the improper testimony was imbued with "an aura of special reliability."

Initially, we reject the contention that expert testimony was necessary in this case. It is clear that hard core pornography can, and does, speak for itself, United States v. Wild, 422 F.2d 34, 36 (2d Cir. 1969), cert. denied, 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152 (1971), and that a jury generally can determine whether allegedly pornographic material

is obscene simply by viewing it. Pinkus v. United States, 436 U.S. 293, 302, 98 S.Ct. 1808, 1814, 56 LEd.2d 293 (1978); Ginzburg v. United States, 383 U.S. 463, 465, 86 S.Ct. 942, 944 16 L.Ed2d 31 (1966). Cf. Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring) ("I know it when I see it ..."). Consequently, there is no "constitutional need for 'expert' testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene material itself is placed in evidence." Kaplan v. California, 413 U.S. 115, 121, 93 S.Ct. 2680, 2685, 37 L.Ed.2d 492 (1973) (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56, 93 S.Ct. 2628, 2634, 37 L.Ed.2d 446 (1973). The Supreme Court has recognized, however, that there may be circumstances in which expert testimony is necessary in obscenity prosecutions. The Court specifically reserved judgment "on the extreme case ...

where contested materials are directed at such a birarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." Paris Adult Theatre I v. Slaton, 413 U.S. at 56 n.6, 93 S.Ct. at 2634 n.6. This exception to the general rule regarding expert testimony in obscenity prosecutions does not apply to this case. We are unwilling to say that expert testimony is constitutionally mandated in all obscenity prosecutions involving materials depicting homosexual acts. Such materials "are not so far removed from the realm of recognizable sexuality as to render jury evaluations inappropriate" and require expert testimony. United States v. Thomas, 613 F.2d 787, 794 (10th Cir.), cert. denied, 449 U.S. 888, 101 S.Ct. 245, 66 L.Ed.2d 114 (1980).

While expert testimony in obscenity cases is not required, it clearly is

permissible. Hamling v. United States, 418 U.S. at 108, 94 S.Ct. at 2902; United States v. Slepicoff, 524 F.2d at 1247-48; United States v. One Reel of Film, 481 F.2d 206, 209 n.3 (1st Cir .1973). The district court in obscenity cases has "wide discretion in its determination to admit and exclude evidence, and this is particulary true in the case of expert testmony." Hamling v. United States, 418 U.S. at 108, 94 S.Ct. at 2902. We will not overturn the district court's decision to admit expert testimony unless the district court abused is discretion. Bauman v. Centex Corp., 611 F.2d 1115, 1120 (5th Cir. 1980).

In this case, the district court might very well have excluded Pastor Green's testimony, as well as the testimony of the other expert witnesses. See United States v. Groner, 479 F.2d 577, 587 (5th Cir.) (en banc) (Ainsworth, J., concurring) (expert testimony in obscenity cases can be helpful, but it may

confuse rather than aid the trier of fact), vacated, 414 U.S. 969, 94 S.Ct. 278, 38 L. Ed.2d 213 (1973) (remanded for reconsideration in light of Miller v. California, 413 U.S. at 15, 93 S.Ct. at 2607), adhered to, 494 F.2d 499 (5th Cir.), cert. denied, 419 U.S. 1010, 95 S.Ct. 331, 42 L.Ed.2d 285 (1974). Nonetheless, we cannot say that the district court abused its discretion in allowing Pastor Green to testify. As adviser and counselor to a predominantly homosexual congregation in Miami, Pastor Green was intimately familiar with the social and sexual mores of at least a large part of Miami's homosexual community. Consequently, his testimony probably provided the jury with a better understanding of the obscenity issue in this case than it otherwise would have had. That he moved to Miami eight months after the films arrived there does not make his testimony inadmissible. The temporal relationship between Pastor Green's arrival in

Miami and the shipment of the films is not so attenuated as to render his testimony irrelevant, so this fact goes to the weight and not the admissibility of the evidence. See Barnes v. General Motors Corp., 547 F.2d 275, 278 (5th Cir. 1977). Finally, Pastor Green's testimony did not prejudice Bagnell. Bagnell's counsel adequately cross-examined Pastor Green and revealed the shortcomings of his testimony. Additionally, Pastor Green's testimony was buttressed by another expert witness who was, if anything, an even more credible witness.

III. ENTRAPMENT

At trial, uncontroverted evidence showed that FBI Agent Livingston first contacted Bagnell in Los Angeles and that Livingston took the lead in proposing to purchase some of Bagnell's movies. The evidence also showed that Bagnell readily agreed to sell the movies and that the only discussion regarding the sale concerned the price and merchandising of the

movies in question. Finally, while the evidence showed that Bagnell had previously shipped pornographic movies throughout the country, there was no evidence to show that he had ever dealt with purchasers in the southern district of Florida or that he had ever had any contacts at all with that district. At the close of the case, the district court did not deliver an entrapment instruction and the case went to the jury. During its deliberations, the jury sent a note to the judge asking if it could consider the entrapment defense that Bagnell's attorney had argued in his opening statement. The judge replied that entrapment was not in issue and that they could not consider it.

Bagnell argues that the judge's decision was erroneous. He contends that the government's case presented enough evidence of entrapment to warrant an instruction to the jury. Bagnell argues that the judge's error was not harmless and therefore warrants reversal. He

asserts that evidence of his predisposition to ship the movies elsewhere does not show that he was predisposed to ship to Miami and that the jury could infer from the evidence that he had been improperly induced to send the materials to the southern district of Florida. He argues that the jury's note further demonstrated the existence of sufficient evidence to support an entrapment instruction. We reject this argument.

Entrapment occurs when the government induces the commission of a crime by one not predisposed to commit it. United States v. Humphrey, 670 F.2d 153, 154 [1982] (11th Cir. 1982); United States v. Webster, 649 F.2d 346, 348 (5th Cir. 1981) (en banc). Entrapment is an affirmative defense that focuses on the defendant's pre-disposition to commit the crime in question. United States v. Webster, 649 F.2d at 348. As entrapment is an affirmative defense, the defendant must come forward with evidence "that the government's conduct created a sub-

stantial risk that the offense would be committed by a person other than one ready to commit it." United States v. Dean, 666 F.2d 174, 180 (5th Cir. 1982); Pierce v. United States, 414 F.2d 163, 168 (5th Cir.), cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969). It is clear that the government's evidence can provide this requisite evidentiary base for an entrapment instruction, Sears v. United States, 343 F.2d 139, 143 (5th Cir. 1965), and that failure to give an instruction when the defendant has met his burden is reversible error. United States v. Timberlake, 559 F.2d 1375, 1379 (5th Cir. 1977).

An entrapment instruction would not have been proper in this case. That the government first suggested or solicited the illegal shipments does not constitute entrapment. The defendant must show "mild persuasion or coercion" on the part of the government before he is entitled to an entrapment instruction.

United States v. Humphrey, 670 F.2d at 156 (quoting United States v. Hill, 626 F.2d 1301, 1304 (5th Cir. 1980). Bagnell has failed to meet this burden. The only showing made here is one of initial government contact and Bagnell's enthusiastic willingness to sell the movies in question.

IV. FIRST AMENDMENT

It is undisputed that the first amendment does not protect obscene material from regulation or suppression by the government. See Roth v. United States, 354 U.S. 476, 483-85, 77 S.Ct. 1304, 1308-1309, 1 L.Ed.2d 1498 (1957); Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020, 1026 (5th Cir. 1981), cert. denied, ---U.S.---, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982). Although this basic proposition has been long established, it was not until the landmark decision in Miller v. California, 413 U.S. at 15, 93 S.Ct. at 2607, that any firm standards were developed to guid the determin-

ation of obscenity, In Miller the Supreme Court established a three-part obscenity test:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Id. at 24, 93 S.Ct. at 2614 (citations omitted.[9/] In applying the first two parts of the

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9/ Miller was a case involving a state obsenity prosecution. The Miller test, however, applies to federal obscenity prosecutions as well. See United States v. Orito, 413 U.S. 139, 145, 93 S.Ct. 2674, 2579, 37 L.Ed.2d 513 (1973) (prosecution under 18 U.S.C. Sec. (1462). Cf. Marks v. United States,430 U.S. 188, 194-96, 97 S.Ct. 990, 994-995, 51 L.Ed.2d 260 (1977) (Miller standards not to be applied retroactively to prosecution under 18 U.S.C. Sec. 1465).

Miller test the trier of fact is required to utilize contemporary community standards to determine whether the allegedly pornographic material appeals to the prurient interest and whether it depicts sexual activity in a patenty offensive manner. In applying the third part of the Miller test to determine whether the materials possess serious valve, however, the trier of fact is not supposed to rely upon contemporary community standards when evaluating the evidence. Smith v. United States, 431 U.S. 291, 300-01 97 S.Ct. 1756, 1763-1764, 52 L.Ed.2d 324 (1977). Miller delineates a constitutional test, however, and its application is not left to the unbridled discretion of the trier of fact. The appellate court is obligated to make an independent review of the material in question and an independent evaluation of the material in light of the Miller criteria. Miller v. California, 413 U.S. at 25, 93 S.Ct. at 2615; Penthouse International, Ltd. v. McAuliffe, 610

F.2d 1353, 1363 (5th Cir.), cert. denied, 447 U.S. 931, 100 S.Ct. 3031, 65 L.Ed.2d 1131 (1980). With these principles in mind, we turn to Bagnell's specific constitutional objections.

Bagnell first argues that the district court failed to instruct the jury on the proper Miller test. Specifically, he complains of a jury instruction that told the jury to evaluate the films according to the community standards of "the southern district of Florida, particulary Dade County." Bagnell contends that the Supreme Court has never sanctioned the use of a community standards instruction based on a geographic area smaller than a judicial district and that such an instruction is too restrictive and subject to prosecutorial abuse. He claims specific prejudice from the instruction because it excluded Broward County, which contains Fort Lauderdale, from the relevant community for purposes of the obscenity analysis.

The former fifth circuit has rejected this argument. In United States v. Groner, 479 F.2d at 577, the former fifth circuit held that in "obscenity cases under federal law 'the community' should logically enbrace that area from which the jury is drawn and selected." Id. at 583. Although Groner was decided before the decision in Miller, nothing in Miller or any subsequent case affects the vitality of the Groner holding regarding the relevant community for purposes of obscenity alalysis. In Hamling v. United States, 418 U.S. at 87, 94 S.Ct. at 2887, the Supreme Court stated that the Miller test envisioned no precise geographical area in determining the relevant community standards. The Court stated, however, that the purpose of the Miller test was "to permit a juror sitting in obscenity cases to draw on knowledge of the community ... from which he comes in deciding what conclusion 'the average person, applying contem-

porary community standards' would reach in a given case." Id. at 105, 94 S.Ct. at 2901. Groner comports with this mandate. It allows the jury to apply first-hand knowledge to the Miller test, thus obviating the need for expert testimony, while providing federal courts with flexibility to adopt efficient local procedures for jury selection. See also United States v. Thomas, 613 F.2d at 792. The jury in this case was drawn from Dade County alone.[10/] Accordingly, the jury instruction based upon the

10/ The Jury System Improvements Acts of 1978, 28 U.S.C. Sec. 1861-1876, declares that juries be "selected at random from a fair cross section of the community in the district or division wherein the court convenes." 18 U.S.C. Sec. 1861. Furthermore, "division" is defined to include "in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district court plan shall determine." 28 U.S.C. Sec. 1869(e).

The southern district of Florida contains no statutory divisions, but instead is required by statute to hold court in five cities, including Miami. 28 U.S.C. Sec. 89. The jury selection plan for the southern dis-

(Continued)

community standards of Dade County complies with our requirement of symmetry between the jury pool and the relevant community.[11]

10/ (Continued)

trict of Florida provides that jurors in trials held at Miami shall be drawn from Dade and Collier Counties. In this case, the judge determined that Collier County residents should be exclued from the venire. Although this decision may indicate technical noncompliance with the 1978 Act, the defendant failed to challenge this decision, and thereby waived any statutory objections to the jury selection. See 28 U.S.C. Sec. 1867(a). We note that even if the judge had fully complied with the requirements of the 1978 Act, no juror would have been drawn from Broward County. Consequently, Bagnell's contention that he was prejudiced because the judge excluded Broward County from the relevant community is completely inapposite in light of Groner's focus upon the jury pool for purposes of determining the relevant community.

11/

The State of Florida has determined that the relevant community for purposes of a state obscenity prosecution is the local county. Johnson v. State, 351 So.2d 10, 11 (Fla.1977). Consequently, any argument by Bagnell as to lack of notice concerning the proper community for first amendment purposes is unavailing.

The net result of the holdings in Groner and in the instant case is as follow: the trial court in a federal obscenity prosecution does not commit error if it defines (Continued)

Bagnell also argues that the four films forming the basis for his conviction are constitutionally protected. Essentially, he urges that the films are not obscene because none of them "deals with minors, with animals, with cruelty, masochism, sadism, excretion, defecation, or anything else that might disqualify [them] for First Amendment protection." Miller cannot be so circumscribed, however, as to apply only to this rather restrictive litany of possible sexual practices. The Supreme Court determined that a case-by-case evaluation of allegedly obscene material was appropriate precisely because such a list is impossible to draft. Additionally, the various degrees of tolerance thoughout the country would make

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11/ (Continued)
the relevant community as the area from which the jury is to be drawn according to the local jury selection plan, or the area in which the ofense was committed if, as in this case, the jury is actually drawn from the area without objection by the defendant.

such a list unresponsive to local needs. Miller v. California, 413 U.S. at 27-28, 30-32, 93 S. Ct. at 2616-2617, 2618-2619.

Applying Miller to the four films, we have no doubt whatever that they are obscene and may form the basis for Bagnell's conviction. Each film is devoted exclusively to the explicit depiction of various sexual practices. None of the films has a plot or any dialogue, nothing, in fact, save continual intercourse. In the first film a man and a woman engage in oral, anal, and genital copulation, while the second film depicts two women and a man engaging in oral and genital copulation as well as the women engaging in lesbian acts. Both the third and forth films depict nothing but homosexual acts involving various types of oral copulation, anal copulation, and mutual masturbation. There can be no doubt that the average person applying contemporary community standards would find that each of the

films appeals to the prurient interest and depicts sexual conduct in a patently offensive manner. Similarly, each film is devoid of any value, let alone any serious value, aside from its intended commercial purpose to cater to a prurient interest in sex. Each movie is a nonstop assault on the sensibilities of the viewer and manages only to debase sexual activity with its numbing explicitness.

We conclude that each film satisfies each part of the Miller test and accordingly falls outside the ambit of the first amendment. We have, in addition, determined that the district court did not commit reversible error in any of its rulings in this case.[12/] There being no constitutional impedi-

12/ Bagnell raises three other contentions on appeal which can be dismissed in short order. He contends that the twenty-six month delay between the occurrence of the crimes charged and his indictment was prejudicial and requires reversal. For pre-indictment delay to warrant reversal, however, the defendant must show that the delay was motivated by an improper prosecutorial

(Continued)

ment to Bagnell's conviction or any trial error, we affirm his conviction under all four counts of the indictment.

AFFIRMED

12/ (Continued)

purpose and resulted in prejudice to the defendant. United States v. Durnin, 632 F.2d 1297, 1299 (5th Cir. 1980). Bagnell has failed to show an improper motive on the part of the government. Indeed, delay so as to allow a national investigation to proceed unhindered is manifestly proper. Bagnell's conclusory assertions of prejudice are also unconvincing.

Bagnell also argues that the district court improperly restricted voir dire. Curiously, he correctly concedes that this issue is completely foreclosed by Smith v. United States, 431 U.S. 291, 308, 97 S.Ct. 1756, 1767, 52 L.Ed.2d 324 (1977). Finally, Bagnell contends that a mistrial should have been declared when the prosecutor asked a witness whether Bagnell had offered to sell "animal films." He asserts that there was no basis for the question and that its implications prejudiced him. While we agree that the prosecutor acted improperly in this instance, the question does not require reversal. Any prejudice that might have resulted was dispelled when the witness testified that Bagnell did not sell "animal films." Additionally, the district court promptly gave an adequate curative instruction.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Filed
September 21, 1982

No. 81-5384

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

WALTER "FRENCHY" BAGNELL,

Defendant-Appellant.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion June 28, 1982, 679 F.2d 826).

Before VANCE, HATCHETT and ANDERSON, Circuit Judges. PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ ROBERT S. VANCE
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
FEB 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-944

In the Supreme Court of the United States

OCTOBER TERM, 1982

WALTER "FRENCHY" BAGNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether charges of transporting obscene materials in interstate commerce, in violation of 18 U.S.C. 1462 and 1465, may properly be prosecuted in the district of receipt.

2. Whether the issue of obscenity may be judged according to the community standards of that portion of the federal judicial district from which jurors are customarily drawn in criminal trials in the city of receipt, rather than the community standards of the entire district.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-38) is reported at 679 F.2d 826. The opinion of the district court (App. A, *infra*, 1a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on June 28, 1982, and a petition for rehearing was denied on September 21, 1982 (Pet. App. B). The petition for a writ of certiorari was

filed on November 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of two counts of interstate transportation of obscene films by common carrier, in violation of 18 U.S.C. 1462 (counts 1 and 3), and two counts of interstate transportation of obscene films for the purpose of sale and distribution, in violation of 18 U.S.C. 1465 (counts 2 and 4). He was sentenced to 18 months' imprisonment and fined $5,000 on count one; he was sentenced to five years' probation on the remaining counts.

In early 1977, the FBI began a nationwide investigation of violations of the federal obscenity laws. FBI Agent Patrick Livingston formed a corporation in Miami, Florida, that purportedly engaged in the mail order pornography business. Livingston then ordered sexually explicit materials from dealers across the country.

Petitioner was a distributor and producer of pornographic films in Los Angeles, California. In September 1977 while in Los Angeles, Livingston was introduced to petitioner by Paul Howard, who owned adult book stores and massage parlors in Tampa, Florida. Petitioner had supplied Howard with pornographic merchandise in the past. Petitioner told Livingston that he was acquainted with the owner of a peep show in Dade County, Florida, and that he had customers in Tulsa, Baltimore, New York, and Chicago (Tr. 172-189).

On the following day, at petitioner's office, Livingston expressed an interest in purchasing porno-

graphic films that would be shipped to his company in Miami. With no reluctance, petitioner agreed to sell petitioner 50 films at $5.50 per film. Livingston received the shipment in Miami four days later. The package contained ten copies each of five pornographic films depicting heterosexual activity (Tr. 185-188).

Later in the month, petitioner travelled to Tampa to conduct business with Howard. Livingston met the two men and paid petitioner for the films with a $250 check. The check was returned by the bank, however, without payment. Livingston therefore met with petitioner again in October in Chicago and reimbursed petitioner in cash (Tr. 196-197). Livingston ordered more films from petitioner at this time. These films were from a series of films produced by petitioner and depicting homosexual activity. Petitioner charged Livingston five dollars per film. In December, while in Miami, Livingston received a shipment of four films sent by petitioner (Tr. 208-217).

Two films from the first shipment and two films from the second shipment were alleged in the indictment to be obscene. These films contained no plot, sound, or subtitles, and they explicitly depicted ultimate sexual acts photographed at close range.

2. a. Prior to trial, petitioner moved for a change of venue or, in the alternative, dismissal of the indictment. He claimed that he could not be prosecuted in the Southern District of Florida unless the government proved that he had shipped pornographic materials to that district prior to his dealings with Agent Livingston. He relied on *Blucher* v. *United States*, 439 U.S. 1061 (1979), in which this Court granted the government's request to vacate an obscenity conviction obtained in violation of an internal

Justice Department policy against arbitrary forum shopping in such cases. The district court held that the order in *Blucher* was not a binding precedent or a decision on the merits of the venue question (App. A, *infra*, 3a-7a). In addition, the court concluded that the internal policy had not been violated here. The court noted that the pornography investigation that led to petitioner's indictment was originally begun by a local Dade County police officer (App. A, *infra*, 2a). FBI agents aided the investigation by working undercover and by setting up a business in Miami from which they ordered pornographic materials. *Ibid.* The court further found that the government did not select Miami in bad faith (*id.* at 4a, 13a):

> [T]he record reveals no direct evidence that Miami was chosen as the forum because of its conservatism in matters of sexual expression, nor is there evidence of a punitive motivation by the government in trying these cases in Miami. * * *
>
> The government points to evidence that its * * * operation developed out of a budding successful undercover operation by local law enforcement officers and that the continuation of the operation in Miami over the two and one-half year period was a natural and inevitable way to maintain the apparent integrity of the undercover operation. Furthermore, the government opines that Miami is actually a rather liberal and tolerant community.
>
> * * * * *
>
> [T]he evidence adduced to this date in all the hearings concerning these cases does not indicate outrageous governmental misconduct. The government's choice of venue in Miami is logical and reasonable. The origin of the undercover op-

> eration in Miami can only be attributed to good faith motivations.

Based on these findings and its interpretation of *Blucher*, the district court denied petitioner's motion.

b. Petitioner also urged the court to make the entire Southern District of Florida the appropriate community for the purpose of evaluating the obscenity vel non of the films. However, in accordance with local practice, the jury venire was drawn entirely from Dade County, the site of the trial and the county into which petitioner had mailed the films. The district court instructed the jurors (Tr. 517) to evaluate the films by "the contemporary community standards in the Southern District of Florida, particularly Dade County * * *." Applying these standards, the jury found the films obscene.

3. The court of appeals affirmed (Pet. App. A-1 to A-38). It found that venue in the district of receipt was proper because offenses "involving the use of the mails, or transportation in interstate commerce" may generally be prosecuted "in any district from, through, or into which such commerce or mail matter moves" (18 U.S.C. 3237). The court of appeals also rejected petitioner's claim that *Blucher* v. *United States*, *supra*, called for a different result (Pet. App. A-13 to A-14):

> It is clear that the Supreme Court's disposition of *Blucher* was not a decision on the merits of the venue claim, but was merely a response to the Solicitor General's motion. See *Thompson* v. *United States*, 444 U.S. 248, 249-250 * * * (1980) (per curiam) (citing *Blucher* as an example where the Court had "responded to requests by the Government * * * by granting certiorari and vacating the judgments"). Conse-

> quently, the summary action of the Supreme Court in *Blucher* has no precedential value for the specific venue issue presented in this case. Indeed, [petitioner's] due process argument has been foreclosed by the decision in *Hamling* v. *United States*, 418 U.S. at 87 * * *. In *Hamling* the Supreme Court specifically held that it was constitutionally permissible to subject defendants in obscenity prosecutions to varying community standards of the various judicial districts into which they transmit obscene material. *Id. at* 106 * * *.

The court of appeals further held (Pet. App. A-15 to A-16) that the Department of Justice's policy against arbitrary forum shopping "create[s] no enforceable right on the part of a criminal defendant. * * *" The court stated (*ibid.*), "[i]t is thus solely within the province of the Justice Department to determine whether an internal policy against forum shopping in obscenity cases should bar prosecution in a given case."

The court also rejected petitioner's claim that the jury should have been drawn from the entire judicial district, and especially Broward County, rather than Dade County alone (Pet. App. A-31 to A-34). The court noted that the Southern District of Florida is required to hold court in five cities, including Miami, the county seat of Dade County. The jury selection plan for the Southern District provides for the selection of jurors from only those counties nearest the site of trial. Hence, the court concluded, petitioner had no right to a jury drawn from the entire district or from Broward County, which provides jurors for trials held in Ft. Lauderdale (Pet. App. A-33 n.10).

Similarly, the court held that it was proper for the jurors to judge the films by the standards of Dade County (Pet. App. A-33 to A-34).[1]

ARGUMENT

1. Both courts below correctly held that it was proper to try petitioner in the Southern District of Florida. Petitioner does not deny that the applicable venue statute, 18 U.S.C. 3237(a), permits prosecution in any district in which the offense was "begun, continued, or completed." Here, the offenses were "completed" in the district of receipt, the Southern District of Florida. Petitioner argues, however, that this Court held in *Blucher* v. *United States*, 439 U.S. 1061 (1979), that a person who ships obscene materials to a government agent at the agent's request may not be prosecuted in the district of receipt unless the shipper previously sent such materials to private parties in that district. Petitioner misconstrues both the government's policy against arbitrary forum shopping in obscenity cases and the effect of this Court's ruling in *Blucher*.

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[1] On December 20, 1982, the district court entered an order dismissing most of the indictments that stemmed from the 1977 Miami-based pornography investigation. The court found that Agent Livingston had testified falsely before the grand jury. The government has moved for reconsideration of this order in the district court.

Petitioner was not among the defendants who moved for dismissal. On December 23, 1982, however, the district court granted petitioner 30 days in which "to file the appropriate Motion requesting the judgment and conviction heretofore entered to be set aside" (App. B, *infra*, 15a). Thereafter, pursuant to petitioner's request, the district court agreed to take no action in petitioner's case until this Court disposes of his certiorari petition.

As previously noted, the venue statute authorizes prosecution of a shipper or mailer of obscene materials in the district from which the materials are sent, the district of receipt, and any other district through which they pass. 18 U.S.C. 3237(a).[2] And because obscenity vel non is determined by the standards of the community in which the trial is held, venue plays an important role in obscenity prosecutions. In enacting the federal obscenity statutes, Congress fully approved the bringing of obscenity prosecutions in the district of receipt (see H.R. Rep. No. 1614, 85th Cong., 2d Sess. 2 (1958); 104 Cong. Rec. 8991-8992 (1958) (remarks of Rep. Reuss)). However, Congress expressed concern about prosecuting such cases in districts through which the materials passed because prosecution in such districts would make a distributor's fate depend upon such fortuitous and uncontrollable circumstances as postal and shipping routes rather than upon a conscious decision to send materials into the district of prosecution. To allay these concerns, the Post Office Department represented that it would not press for prosecution in districts through which the materials merely passed. S. Rep. No. 1839, 85th Cong., 2d Sess. 2 (1958).

The *Blucher* policy was developed in accordance with this promise. Blucher operated a mail order pornography business in Oregon and was under investigation by the Oregon postmaster. At the request

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[2] Prosecution in the Southern District of Florida also comported with the constitutional requirement that the charges be brought in the state where the offenses occurred (Article III, Section 2), and with the Sixth Amendment and Fed. R. Crim. P. 18, which require that the indictment be returned in the district in which the offense is committed.

of the Oregon postmaster, the postmaster in Wyoming ordered materials from Blucher. *United States* v. *Blucher*, 581 F.2d 244, 245 (10th Cir. 1978). The government had no reason to believe that Blucher had previously conducted business in Wyoming. On the contrary, "[t]his communication between postmasters was made for no apparent reason other than a subjective judgment that a Wyoming venire would hold a more restrictive 'community standard' " (*ibid.*; footnote omitted). Blucher was indicted, tried, and convicted in the District of Wyoming, and his contention that venue in that district was improper was rejected at trial and on appeal (*ibid.*).

When Blucher petitioned for certiorari, the government re-examined its venue policy in obscenity prosecutions. While asserting its right to bring such prosecutions in the district of receipt and to use postal inspectors and other government agents to solicit obscene materials from pornography distributors, the government nevertheless decided that it would not bring prosecutions in the district of receipt if the defendant had no business contacts with non-governmental customers in the area and the district had been selected for no reason other than its strict community standards. See *Blucher* v. *United States*, No. 78-571 (1978 Term), Memorandum for the United States, 5-7.

The *Blucher* policy is a narrow one. Where the defendant has had prior contacts with both the district of mailing and the district of receipt, the policy is not violated if the government elects to prosecute in the more conservative district. And if the district of receipt is selected for a legitimate reason other than its conservative community standards, the *Blucher* policy permits prosecution in that district even if the defendant did not previously conduct business there.

The government has concluded that the *Blucher* policy was not violated in the present case. First, Miami was selected as the destination for the obscene films for entirely neutral reasons and not because it was believed to be a place where obscenity convictions are relatively easy to obtain. Miami was the headquarters of a nationwide investigation concerning a suspected conspiracy among traffickers in pornography. Moreover, unlike Wyoming, Miami is urban and densely populated, has an extremely heterogeneous population, and its sexual mores are not reputed to be particularly conservative.[3] If the government had been forum shopping, it certainly could have found many districts with less permissive community standards. Furthermore, the fact that petitioner had been sending his wares to Tampa and was an acquaintance of a Miami peep show owner weighs against applying the *Blucher* policy here. That policy is based on principles of fairness, not on the mechanical application of self-imposed venue rules. Had Agent Livingston requested that the films be sent to Tampa instead of Miami, it is doubtful that petitioner's chances of acquittal would have been enhanced.[4] It is therefore sufficient for the purpose of the *Blucher* policy that petitioner shipped his materials into a Florida city prior to the government's investigation.[5]

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[3] In the opinion of the district court, Dade County is the most liberal county in the Southern District (Tr. 442-443).

[4] For petitioner, a resident of California, prosecution in Tampa probably would not have been more convenient than prosecution in Miami.

[5] We note that petitioner regularly shipped his wares to any city with a willing customer; for instance, he shipped to Tulsa, Chicago, Baltimore, and Tampa. Moreover, he expressed no reluctance in selling to Agent Livingston in Miami.

In any event, the internal policy against arbitrary forum shopping in obscenity prosecutions "is intended to be no more than self-regulation on the part of the Department of Justice" (*United States* v. *Nelligan*, 573 F.2d 251, 255 (5th Cir. 1978)). It bestows no enforceable right upon the accused. *United States* v. *Caceres*, 440 U.S. 741 (1979); cf. *United States* v. *Thompson*, 579 F.2d 1184, 1189 (10th Cir.) (en banc), cert. denied, 439 U.S. 896 (1978). Therefore the accused should receive the benefit of that policy only when "its application is urged by the Government." *Rinaldi* v. *United States*, 434 U.S. 22, 31 (1977) (regarding the Department's policy against successive state and federal prosecutions for the same offense). Because prosecution in the district of receipt is clearly authorized by 18 U.S.C. 3237(a) and because the Department has concluded that internal policy does not preclude prosecution in Miami, petitioner's venue argument must fail.[6]

2. Assuming that trial in Florida was appropriate, petitioner alternatively contends (Pet. 23-33) that the obscenity vel non of the four films should have been judged by the standards of the entire Southern District, rather than Dade County alone. This claim is wholly without merit. There is no constitutional or statutory prohibition against limiting the relevant community to that part of a district in which the offense was committed and from which the jury

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[6] Even if venue was not proper in the Southern District of Florida, petitioner is not entitled to dismissal of the indictment. His only remedy would be a new trial in the district from which the materials were shipped, *i.e.*, the Central District of California. In *Blucher* we asked this Court to dismiss the indictment only because the government had already decided not to retry the defendant.

panel is customarily drawn. This Court has approved obscenity prosecutions based on a national standard (*Hamling* v. *United States*, 418 U.S. 87, 103-110 (1974)), a statewide standard (*id.* at 105; *Miller* v. *California*, 413 U.S. 15, 30-32 (1973)), and an undefined "contemporary community standard[]" (*Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974)). The federal obscenity statutes embody a "local standard." *Smith* v. *United States*, 431 U.S. 291, 304 (1977). But as the above case makes clear, the Constitution does not fix precise geographical limits for the relevant community.

Moreover, in many instances, practical considerations weigh against a community that is coextensive with the judicial district. For example, a requirement of district-wide venires would often be unduly burdensome on the prospective jurors, particularly in large districts like Montana or Alaska or even the Southern District of Florida. And in those districts consisting of both urban and suburban or rural areas, drawing jurors from the entire district would probably not work to the benefit of a defendant charged with shipping obscene materials to an urban location. Congress has subdivided many judicial districts, and jury pools are often restricted to residents of counties reasonably accessible to the site of the trial. The Southern District of Florida consists of twelve counties, and trials are held in five separate cities. 28 U.S.C. 89(c). If trial is scheduled in Miami, jurors are drawn from Dade and Collier counties (Pet. App. A-33 n.10).[7] If trial is sched-

[7] In this case, residents of the more rural Collier County were not included in the venire. Petitioner never specifically objected to their exclusion. The gravamen of his complaint has always been the exclusion of Broward County jurors.

uled in Fort Lauderdale, jurors are drawn principally from Broward County. Thus, Broward County residents do not sit on juries in Miami trials.[8] Petitioner has cited no authority requiring the suspension in obscenity cases of the Southern District's plan for the selection of juries.

Furthermore, the Dade County jurors were properly instructed to adjudge the films by "the contemporary standards of the Southern District of Florida, particularly Dade County" (Tr. 517). Because a juror draws on his knowledge of his own community (*Hamling* v. *United States*, *supra*, 418 U.S. at 104), the paramount concern in an obscenity prosecution is that the juror live in the community where the offense was committed. A juror who lives in one county may be unable to ascertain the standards of a different county. See *Miller* v. *California*, *supra*, 413 U.S. at 32-33; *United States* v. *Cohen*, 583 F.2d 1030, 1041 (8th Cir. 1978). Here, the films were shipped to Dade County. The jurors were selected from that county, and they properly applied the standards of their own community.[9]

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[8] Petitioner's claim that Broward County is more liberal and tolerant of pornography than is Dade County is sheer speculation. Broward and Dade Counties are contiguous and both contain large cities. We doubt that their community standards differ appreciably.

[9] Petitioner contends (Pet. 27) that "[a] person shipping sexually explicit materials to, for example, the Southern District of Florida relies on the fact that the liberal community of Fort Lauderdale, in Broward County, is a part of the relevant community." This point is not well taken. If such a person may be assumed to know the boundaries of the federal judicial district of receipt, he may also be assumed to know the portions of the district from which jurors are drawn for trials in the city of receipt. Furthermore, the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1983

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shipper would also be risking state prosecution, and as petitioner concedes (Pet. 29), Florida uses a county-wide standard. See *Johnson* v. *United States*, 351 So. 2d 10, 11 (Fla. (1977)).

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, PLAINTIFF

v.

DEFALCO, *et ano.* (S1)

v.

GUARINO, *et. al.* (S2)

v.

PERAINO, *et al.* (S3)

v.

BOUDREAULT, *et ano.* (S4)

v.

ARNO, *et al.* (S5)

v.

GASWIRTH, *et ano.* (S6)

v.

BELMONT, *et al.* (S7)

v.

WEINTRAUB (S8)

v.

BERNSTENE, *et ano.* (S9)

v.

STURMAN, *et al.* (S10)

v.

HIND, *et ano.* S(11)

v.

DI BERNARDO, *et al.* (S12)

v.

GUGLIELMI (S13)

v.

BAGNELL (S14)

v.

BLOOM, *et. al.* (S15)

v.

ARIENO, *et. al.* (S16)

DEFENDANTS

[Filed Apr. 20, 1981]

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS BASED ON THE GOVERNMENT'S BAD FAITH FORUM SHOPPING

ORDER

This cause is before the Court on the motions of the above defendants to dismiss the indictments in these cases because the government solicited each of the defendants to send allegedly obscene material to Miami and then selected Miami as the forum in which to seek the indictments and to go to trial. Since the defendants rely almost exclusively on the case of *Blucher* v. *United States*, 439 U.S. 1061 (1979), a careful analysis of the holding of this case is necessary to resolve these motions. First, however, a brief statement of the basically uncontested facts is in order.

In 1977, the Federal Bureau of Investigation took over an undercover investigation of major pornography distributors which was originally begun by Of-

ficer Vince Di Giacomo of the Dade County (Fla.) Public Safety Department. F.B.I. agents Patrick Livingston and Bruce Ellavsky were the central undercover figures in the two and one-half year investigation, which the F.B.I. labelled "Miporn" for Miami pornography. Livingston and Ellavsky set up a Florida corporation with offices in Miami and then set about the process of meeting and becoming accepted by national pornography distributors whom they met through introductions at conventions attended by the distributors.

Conventions at Miami, New Orleans, Las Vegas, Seattle, and other cities served as the primary way in which the F.B.I. agents broadened their connections in the pornography business. Each new distributor the agents met was requested by the agents to ship pornographic films and magazines across state lines to the office of the agents' corporation, Golde Coaste Specialties, Inc., in Miami, Florida.

The government contends that each of the defendants did ship such materials to Miami pursuant to the request of the undercover agents. While not disputing that claim, the defendants, or several of them, contend that they had no prior contacts with the Southern District of Florida other than those requested by the government and they were entrapped into sending the materials to Florida. However, the entrapment question, where properly raised, in one for the jury and will not be dealt with here.

The defendants have been charged with violations of 18 U.S.C. §§ 1462 and 1465 as well as with conspiring to violate those statutes. The two substantive statutes proscribe interstate shipment of obscene matter by common carrier or express company and interstate transportation of obscene matter of sale or distribution. 18 U.S.C. § 3237 is the venue statute ap-

plicable to the prosecutions. The defendants contend that the government has unfairly taken advantage of the venue statute by deliberately, for bad faith reasons, selected Miami as the forum in which to bring these prosecutions. Specifically, it is alleged that the government was attempting to find a conservative community in which to try obscenity cases, that obscenity cases had been successfully prosecuted previously in Miami, and that the expense of defending these cases in Miami would in itself punish the defendants for their actions.

However, the record reveals no direct evidence that Miami was chosen as the forum because of its conservatism in matters of sexual expression, nor is there evidence of a punitive motivation by the government in trying these cases in Miami. The Court takes judicial notice of the fact that many persons find it bearable or even pleasurable to spend a vacation in the Miami area.

The government points to evidence that its Miporn operation developed out of a budding successful undercover operation by local law enforcement officers and that the continuation of the operation in Miami over the two and one-half year period was a natural and inevitable way to maintain the apparent integrity of the undercover operation. Furthermore, the government opines that Miami is actually a rather liberal and tolerant community as well as a pleasant place to visit.

The law on this question is not extensive. In *Hamling* v. *United States*, 418 U.S. 87 (1974), the Supreme Court established that local community standards must be applied in federal obscenity cases. The Tenth Circuit, in *United States* v. *Blucher*, 581 F.2d 244 (1978), held that the opinion in *Hamling* coupled

with 18 U.S.C. § 3237, the venue statute which gives the government the choice of prosecuting obscenity cases where the allegedly obscene items were *sent*, where they were *received*, and in any district through which the material *travelled*, authorizes the government to induce the shipment of pornographic matter to such a highly conservative community as a small town in Wyoming. The Tenth Circuit quoted extensively from the *Hamling* opinion, especially language indicating that subjecting obscenity distributors to "the community standards of every hamlet into which their goods may wander" was a necessary result of the decision in *Hamling*, 418 U.S. at 144 (Brennan, J., Dissenting).

Until the appeal of the *Blucher* case to the Supreme Court, that Court had not had an opportunity to confront the issues raised by government-induced shipments of obscene material which lead to the government's choice of venue in a district which otherwise might have had no contact with the defendant.

The defendants contend that the Supreme Court's decision in *Blucher* v. *United States*, 439 U.S. 1061 (1979), is a decision on the merits and is binding as precedent. In *Blucher*, the petitioner was indicted for mailing obscene material from Oregon to a postal inspector, who, using a false name, posed as a civilian purchaser in Wyoming and requested Mr. Blucher to send him material that the government considered to be obscene. Prior to the trial, the petitioner moved to dismiss the indictment on the ground that he had never done business with anyone in Wyoming other than the postal inspector, and that the government had improperly forum-shopped for a more conservative community in which to try him. Upon denial of the motion, Blucher entered a plea of guilty to one

count of the indictment and the question of the legality of the proceeding was expressly reserved for appellate review. When the Tenth Circuit upheld the conviction, Blucher filed a petition for writ of certiorari which the Supreme Court granted. The Supreme Court, without writing an opinion, remanded the case to the United States District Court for the District of Wyoming with directions to vacate its judgment and to dismiss the indictment.

In *Blucher*, the government maintained in its memorandum to the Supreme Court on petition for certiorari that Blucher's arguments were legally unsound, but nevertheless concluded that,

> the petitioner's prosecution for mailing obscene materials to the Wyoming postal inspector violates policies that the Department of Justice is obligated to follow in the light of a commitment made by the Executive Branch to Congress with regard to choice of venue for prosecution of Section 1461 violations.

Because of these policies the government explained that the judgment of conviction should be vacated and the indictment dismissed.

The government's memorandum in *Blucher* elaborated on this executive policy, stating that,

> the Senate agreed to the language of the section under which petitioner was prosecuted only on an assurance that the Post Office would not press for prosecution of violations in districts through which the material alleged as obscene had passed, on its way from the district of deposit to the district of receipt. Although that assurance does not literally cover prosecutions in districts to which a pornography distributor sends material only in response to the request of government agent act-

> ing under a fictitious name, the Department of Justice is of the view that, in some circumstances, such prosecutions probably represent "unrestricted forum shopping" similar in character to the type about which the Senate expressed concern. Accordingly, it is the policy of the Department not to prosecute a pornography distributor under 18 U.S.C. 1461 in any district to which he has mailed material in response to a request from a government agent acting in an investigative capacity, so long as the Department had no information that the distributor has had any other contacts with the district relating to his pornography enterprise.

In *Blucher*, there was no indication that, before the mailings for which the defendant was indicted had occurred, he had ever mailed any porongraphic materials to a Wyoming resident or had solicited any business there. For this reason, the solicitor general stated that the defendant's prosecution violated the policy of the Department of Justice, and accordingly he requested that the Court vacate the judgment of the court of appeals and remand with directions to dismiss, which the Supreme Court did.

The defendants contend that where, as in *Blucher*, the government as respondent confesses error, the Supreme Court's acceptance of the confession of error constitutes a decision on the merits and has precedential weight. The defendants cite *Young* v. *United States*, 315 U.S. 257, 258-59 (1942), to support this contention.

Young involved the prosecution of a physician for administering Paregoric cough syrup and other preparations containing a limited amount of narcotics, without keeping records. The prosecution claimed that the physician was a "dispensing physician" and was,

under the Harrison Anti-Narcotics Act required to keep records. The court below took the position that it was an unconditional requirement that all vendors of exempt preparations keep records.

One of the errors confessed by the government in *Young* was that the penal provision did not apply to a physician who administers exempt preparations solely to patients whom he personally attends. The Supreme Court in considering the penal provision concluded that the government was correct in their confession of error, and that Congress meant to exclude physicians administering to patients they personally attend.

The defendants in the present cases rely upon the following statements by the Court in *Young*:

> The public trust reposed in the law enforcement officers of the government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors.

Id. at 258.

Despite the statement in *Young* regarding independent examination of the errors, the case is distinguishable from *Blucher*. Clearly, the government did not confess legal error in Blucher. It merely stated its own policy on a question of presumed agreement with the Congress, an issue which the Tenth Circuit had not directly treated.

Furthermore, in *Young*, the Court gave an opinion, allowing future litigants and courts to see their analysis of the errors claimed. In *Blucher*, by contrast, the Supreme Court gave no opinion at all. Admittedly, the fact that no opinion was given does not always deny all precedential value, though it might lessen it substantially. In *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974), Justice Rehnquist said of summary affirmances that while they "obviously are of precedential value" in support of the necessarily implicit holdings, "[e]qually obviously they are not of the same precedential value as would be an opinion of this court in treating the question on the merits." Also, in *Hicks* v. *Miranda*, 422 U.S. 332, 334 (1975), the Court quotes Justice Brennan, approvingly: "Votes to affirm summarily, and to dismiss for want of a substantial federal question . . . are votes on the merits."

Another distinction in *Blucher* which denies it precedential value is the fact that the judgment was vacated and the case remanded to the United States District Court for the state of Wyoming, with directions to vacate its judgment and dismiss the indictment. In contrast, *Young* was reversed and remanded. This is a very crucial distinction because in vacating the judgment there is no opinion at all to consider, unlike the situation resulting from a reversal or an affirmance, where the opinion affirmed or reversed can be referred to for guidance.

Moreover, if *Blucher* were precedent, the holding would leave so many unanswered questions as to be nearly meaningless. The decision, without opinion, offers no explanation of how to interpret previous contacts within the affected district by the defendant. Previous contacts could be confined only to contacts

with the state regarding materials upon which the indictment is based or could be any business done within the state. There is also no indication of which party would have the burden of establishing whether or not there were any previous contacts with the district.

For all the above reasons, the Court finds that *Blucher* is not a decision on the merits and is not binding as precedent. Thus, the Court is left with no clear precedent on the legal issue presented. The issue is one of due process of law, not entrapment, although the theory of the argument is found in an entrapment case, *Uniter States* v. *Russell*, 411 U.S. 423 (1973).

In *Russell*, an undercover agent supplied a quantity of a legal but difficult to obtain chemical to to members of a drug manufacturing ring he had infiltrated. In a five to four decision, the Court rejected Russell's contention that the government's involvement in the crime was so great that prosecution should have been barred as a matter of law. *Id.* at 430-31. The majority opinion left open the possibility that the Court might "someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-32. The Court relied on its assessment that at least in drug related offenses, infiltration of drug rings and a limited participation in their illegal activities was permissible as the "only practicable means of detection." *Id.* at 432.

Hampton v. *United States*, 425 U.S. 484 (1976), presented the Court with the issue of improper law enforcement conduct, however the Court did not arrive at a majority opinion regarding the due process

applicable to such conduct. In *Hampton*, the petitioner was convicted of selling a drug to a government agent which had been supplied to him by another government agent. Hampton contended that although his admitted predisposition deprived him of the traditional entrapment defense, the government's outrageous conduct in supplying him with contraband for which he was convicted denied him due process of law. The plurality opinion rejected the petitioner's contentions. *Id.* at 488-490.

Justices Powell and Blackmun concurred in the result but disagreed with the plurality's view that due process could never bar conviction of a predisposed defendant regardless of the outrageousness of the government's behavior. Powell noted that the Court had not yet had the occasion *"to confront Government overinvolvement in areas outside the realm of contraband offenses," id.* at 493, thus implying that in such cases the Court might more readily find a sufficient level of outrageousness to bar prosecution.

Justice Powell's concurring opinion also noted as applicable to the due process issue the principles enunciated in Justice Frankfurter's concurring opinion in *Sherman* v. *United States*, 356 U.S. 369 (1958), an entrapment case:

> [W]e should not disregard lightly Mr. Justice Frankfurter's view that there is a responsibility "necessarily in [the Court's] keeping . . . to accommodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of modern criminals." *Sherman* v. *United States* . . . In another context Mr. Justice Frankfurter warned that exclusive focus on predisposition creates the risk that the Court will "shirk" the responsibility that he perceived. *Id.* 425 U.S. at 494, n. 5.

In addition, the concurring opinion in *Hampton* responds to the plurality's argument that without its absolute rule regarding predisposition, delineating limits on police involvement in crime will be difficult, however,

> these difficulties do not themselves justify the absolute rule. Due process in essence means fundamental fairness . . . . The fact that there is sometimes no sharply defined standard against which to make these judgments is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances. *Rochin* v. *California* [342 U.S. 165, 169-172 (1952)]. *Id.* at 494, n. 6.

The dissenting opinion by Justice Brennan expressed agreement with the concurring opinion that due process is a viable defense where government conduct has been egregious. *Id.* at 499. Thus, a majority of the Court, comprised of the concurring and dissenting Justices in *Hampton*, concluded that due process may be raised as a defense even by a predisposed defendant.

The Fifth Circuit addressed the due process theory after *Hampton in United States* v. *Graves*, 556 F.2d 1319 (1977). There, the Court held that the trial court did not err in entertaining a pre-trial motion to dismiss on the grounds of governmental misconduct. The indictment in issue in *Graves* charged the defendants with a conspiracy to submit false statements to the Federal Housing Administration. The defendants claimed that the indictment should be dismissed because government officials approved and encouraged submission of false statements. Although the Court held that dismissal of the indictment was not justified by the evidence in the case, the defense of due process

was stated to be a viable one in the Fifth Circuit. "We therefore conclude that it was proper for the district court to entertain the appellees' pretrial motion to dismiss on the ground of governmental misconduct." *Id.* at 1322-23. The Fifth Circuit has thus adopted the view of the concurring and dissenting justices in *Hampton*.

Returning to the facts of the present case, the evidence adduced to this date in all the hearings concerning these cases does not indicate outrageous governmental misconduct. The government's choice of venue in Miami is logical and reasonable. The origin of the undercover operation in Miami can only be attributed to good faith motivations.

Even if there had been bad faith, such that the government believed that Miami is very conservative and that defending a criminal trial is very expensive in Miami, such conduct, in and of itself, would not reach the level of "outrageous government misconduct." Thus, even though there may exist a valid entrapment defense applicable to one or more of the defendants in these cases, the government's choice of forum does not so violate due process of law as to require dismissal of the present indictments.

For all of the above reasons, the defendants' motions to dismiss the above indictments on the basis of bad faith forum shopping are hereby DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 8 day of April, 1981.

/s/ Eugene P. Spellman
EUGENE P. SPELLMAN
United States District Judge

Copies to: all parties

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 80-56-Cr-EPS (S1-S-16)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT "DEBE" DIBERNARDO, ET AL., DEFENDANT

[Filed Dec. 23, 1982]

ORDER INSERTING OMITTED
FOOTNOTE TO OPINION

THIS COURT being aware of an omission to its Memorandum Opinion and Order Dismissing Indictments Without Prejudice, dated December 20, 1982 does hereby,

ORDER AND ADJUDGE that the following footnote be added to page 30:

[12] The Orders of dismissal contemplated in this opinion do not refer to cases: 80-56-Cr.-EPS (S3), (S12), (S14) and obviously (S9) (judgment of acquittal having heretofore been entered). As pertains to those cases the following action will hereinafter be taken by the Court: With regard to *United States* v. *Peraino, et al.*, 80-56-Cr-EPS (S3), the Court will issue a Rule to Show Cause why, even in light of the findings in this opinion, relief should be granted the defendants as Special Agent Livingston did not testify at that trial; as pertains to United States v. DiBernardo, *et al.*, 80-56-Cr-EPS (S12); the Court will issue a Rule to Show Cause why under the circumstances of

that case, Special Agent Livingston having testified, relief should not be granted; and finally with reference to *United States* v. *Bagnell*, 80-56-Cr-EPS (14), defendant is granted 30 days by Order of this Court within which to file the appropriate Motion requesting the judgment and conviction heretofore entered to be set aside.

Page 30 should read as follows:

ORDER AND ADJUDGE that an order shall hereinafter be entered dismissing without prejudice each of the superseding indictments in *United States* v. *DiBernardo, et al.*, Case No. 80-56-Cr.-EPS (S1-S16) and entering such other Orders as are appropriate in each case to dispose of all pending matters.[12]

DONE AND ORDERED in Chambers, at Miami, Florida this 23 day of December, 1982.
ect.

/s/ Eugene P. Spellman
United States District Judge

Copies furnished:

All attorneys of record.

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